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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 150.

W. A. SHIELDS,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

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Opinions Below.

The judgment of the District Court (R. 297-298) is unreported. The opinion of the Circuit Court of Appeals (R. 345-354), reported in 220 F. 2d 242, is printed as Appendix "E" hereof.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

Petitioner, in his statement of the questions, presupposes that the Interstate Commerce Commission has not adopted any regulation prescribing the "number, dimension, location and manner of application" of running boards with which railroad tank cars are required to be equipped.

Title 45, Section 12, U. S. C. provides that "the number, dimensions, location and manner of application of the appliances provided for by Sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as standards of equipment to be used on all cars subject to the provisions of Sections 1-16 of this Title" (Appendix "B").

Pursuant to Sections 11 and 12, Title 45, U. S. C. the Interstate Commerce Commission adopted regulations as to the number, location, etc. of running boards on tank cars. Code of Federal Regulations, Title 49-Transportation, Section 131.8, page 203 and Section 131.9, page 205 (Appendix C and D).

We therefore submit that the question should be stated as follows:

The Interstate Commerce Commission having prescribed the regulations and standards for the "number, dimension, location and manner of application" of the running boards with which railroad tank cars are to be equipped, pursuant to Title 45, U. S. C., Sections 11 and 12 of the Federal Safety Appliance Act, are such regulations setting forth the "number, dimension, location and manner of application" conclusive as to such appliances, or should this question be left to the determination of the Court or jury?

Statutes and Regulations Involved.

United States Code, Title 45, Sections 11 and 12 are printed in Appendix A and B.

Code of Federal Regulations, Title 49, Transportation, Section 131.8 and Section 131.9 are printed in Appendix C and D.

Statement.

Petitioner's first paragraph of his statement, on page 2, is substantially correct.

Lest there be a misunderstanding as to which appliance broke, we respectfully point out that the dome step board located near the top of the dome of the tank car, used in loading and unloading, was the board involved in the case. The board, running continuously around the car near the bottom, is not involved.

Petitioner stresses the point that the board which broke was sometimes referred to, during the trial, as a "running board" rather than a dome step board. We assume this point was stressed since neither the Federal Safety Appliance Act nor the regulations of the Interstate Commerce Commission refer to a "dome step board".

Title 45, U. S. C., Section 12, provides that "the number, dimension, location and manner of application" of the appliances provided for by Sections 4 and 11 of Title 45 as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of Sections 1 through 16 of the said title. The Interstate Commerce Commission, under the authority of the Act, has prescribed and established, by regulation, the number and location of the run-

ning boards on tank cars. The code of Federal Regulations, Title 49-Transportation, Section 131.8, provides as follows:

RUNNING BOARDS.

Number:

One (1) continuous running-board around sides and ends; or two (2) running full length on tank, one (1) on each side.

Dimensions:

Minimum width on sides, ten (10) inches.
Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running boards shall extend from center to center of bolsters, one (1) on each side.

Manner of Application:

If side running boards are applied below center of tank, outside edge of running boards shall extend not less than seven (7) inches beyond bulge of tank. The running boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with couplerhorn against the buffer-block, end-sill or back-stop. Running boards shall be securely fastened to tank or tank-bands.

Section 131.9 provides as follows:

RUNNING BOARDS.

Number:

One (1).

Dimensions:

Minimum width on sides, ten (10) inches.
Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of tank.

Manner of application:

If running boards are applied below center of tank, outside edge of running board shall extend not less than seven (7) inches beyond bulge of tank. Running boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back stop. Running boards shall be securely fastened to tank or tank bands. (Appendix C & D.)

Thus it is crystal clear that the Interstate Commerce Commission has provided for the number and the location of running-boards in accordance with Title 45, U. S. C., Sections 11 and 12. These do not include the dome step board involved in this proceeding.

Argument.

1. Petitioner argues that the Interstate Commerce Commission has not promulgated any regulations pursuant to Title 45, Section 12 of the Federal Safety Appliance Act, designating the number and location of running boards on tank cars. We submit that this is an erroneous assumption. The Interstate Commerce Commission has very definitely designated and provided for the number and location of running boards on tank cars (Sections 131.8 and 131.9, Code of Federal Regulations, Title 49). Nowhere in the Federal Safety Appliance Act, or the Code of Federal Regulations are dome step boards mentioned. The Court of Appeals correctly stated:

> "For it is not every device with which a car might be equipped which comes under, and is governed by the Safety Appliance Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such."

2. The decision below is clearly in accordance with the latest decisions of the Supreme Court. Petitioner states that the decision of the Court below is in conflict with the case of *Illinois Central Railroad Co.* v. *Williams,* 242 U. S. 462, 61 Law Ed. 437. That case was decided in 1917 and concerned an accident which occurred in 1913. At that time the Interstate Commerce Commission had not acted in setting up any regulations as provided in Section 12, Title 45, U. S. C. The Supreme Court points this out in the case of *A. T. & S. F. Railroad* vs. *Scarlett,* 300 U. S. 471, 81 Law Ed. 748 (1937).

By the time the *Scarlett* case was decided (1937) the Interstate Commerce Commission had acted in providing regulations and standards for the appliance in question in that case. The Supreme Court, in the *Scarlett* case, unequivocally and very definitely points out that once the Interstate Commerce Commission has acted the ruling in the *Williams* case, relied on by the Petitioner here, is obsolete and without legal effect.

The *Williams* case was cited and relied upon by the plaintiff-respondent in the *Scarlett* case, and the Supreme Court disposed of the *Williams* case with the following statement:

> "In Illinois C. R. Co. v. Williams, 242 U. S. 426, 466, 61 Law Ed. 437, 440, 37 S. Ct. 128, we held that Section 2* of the Act requiring secure ladders, etc.,

* Sec. 11, Title 45, U. S. C.

> was operative pending action by the Interstate Commerce Commission under Section 3*. In the interim, we said, Section 2 had the effect of prescribing an absolute and imperative duty, of making the ladders and other appliances 'secure', but that Section 3* contemplated that these appliances shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission, that is, that they shall be standardized."

The Supreme Court, in the *Scarlett* case, clearly set forth the principle of law governing this case:

> "The regulation having been made by the Commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. *The judgment of the trial Court and jury cannot be substituted for that of the Commission*" (Emphasis supplied).

In 1925, some eight years after the *Williams* case was decided and twelve years before the *Scarlett* case, the Supreme Court held that Congress delegated to the Interstate Commerce Commission sole jurisdiction over "the number, dimensions, location and manner of application of the appliances provided for by Sections 4 and 11 of the Title."

Davis, Director General of Railroads vs. *Manry*, 266 U. S. 401; 69 Law Ed. 350 (1925).

It is crystal clear that the decision of the Court of Appeals follows the law as laid down by this Court in the *Scarlett* case, and is not in conflict with any decision of the Supreme Court.

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* Sec. 12, Title 45, U. S. C.

3. Petitioner states that the decision below "is believed to be in conflict" with the decision of the Fourth Circuit Court of Appeals in *Davis v. Reynolds*, 280 Fed. 363, cert. denied, 258 U. S. 627 and the decision of the Ninth Circuit Court of Appeals in *Southern Pacific Co. v. Carson*, 169 Fed. 2d 734.

The *Davis* v. *Reynolds* case was decided in 1922. The plaintiff-respondent in the *Scarlett* case, cited the *Davis* v. *Reynolds* case along with the *Williams* case, in support of substantially the same contention that the petitioner here argued before the Court of Appeals and would now have this Court review. We submit that if there is a conflict, as urged by the petitioner, it was resolved by the decision in the *Scarlett* case.

In *Southern Pacific Co.* v. *Carson*, the Ninth Circuit Court of Appeals made this observation:

> "Here, if the facts be given attention as plainly they must, it can not rationally be said that the brake club did not constitute a part of the hand brake. The club was not a contrivance separate and distinct from the brake, nor was it designed or used for a purpose apart from the use of the brake."

Manifestly, the defective brake club was an integral part of the brake which had been prescribed by the Interstate Commerce Commission pursuant to the Safety Appliance Act, 45 U. S. C. Sec. 12. The dome step in this case is not a part of, and is in no way related to the running boards, prescribed, as to number and location, by the Interstate Commerce Commission.

Conclusion.

The Court below was correct in holding that the petitioner, an independent contractor, should pursue his right of action under the common law rules of negligence and not under the Safety Appliance Act.

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix "A".

Statutes Referred To.

Title 45, United States Code.

Section 11: Safety appliances required for each car; when hand brakes may be omitted.

"It shall be unlawful for any common carrier subject to the provisions of Sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: PROVIDED, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, 2, 36 Stat. 298."

Appendix "B".

Statutes Referred To

Title 45, United States Code.

Section 12. Safety appliances; as designated by commission, to be standards of equipment; modification of standard height of draw-bars.

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of sections 1-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of sections 11-16 of this title. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw-bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed or the standard so prescribed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. Apr. 14, 1910, c. 160, 3, 36 Stat. 298."

Appendix "C".

Regulations Adopted by the Interstate Commerce Commission in Pursuance of Sections 11 and 12, Title 45, United States Code.

Section 131.8 (Page 203) Code of Federal Regulations, Title 49—Transportation.

TANK CARS WITHOUT SIDE-SILLS AND TANK CARS WITH SHORT SIDE-SILLS AND END-PLATFORMS.

Hand-Brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

RUNNING BOARDS

Number:

One (1) continuous running-board around sides and ends; or two (2) running full length on tank, one (1) on each side.

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running-boards shall extend from center to center of bolsters, one (1) on each side.

Manner of Application:

If side running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

The running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with couplerhorn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

SIDE-STEPS

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side under side-hand-hold.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24) preferably not more than twenty-two (22), inches above the top of rail.

Manner of application:

Same as specified for "Box and other house cars."

LADDERS.

(If running-boards are so located as to make ladders necessary)

Number:

Two (2) on cars with continuous running-boards.

Four (4) on cars with side running-boards.

Dimensions:

Minimum clear length of tread, ten (10) inches.

Maximum spacing of treads, nineteen (19) inches.

Hard-wood treads, minimum dimensions, one and one-half (1½) by two (2) inches.

Wrought iron or steel treads, minimum diameter, five-eighths (⅝) of an inch.

Minimum clearance, two (2) preferably two and one-half (2½) inches.

Location:

On cars with continuous running-boards, one (1) at right end of each side.

On cars with side running-boards, one (1) at each end of each running-board.

Manner of application:

Ladders shall be securely fastened with not less than one-half (½) inch bolts or rivets.

SIDE-HANDHOLDS.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) on face of each side-sill near each end on tank cars with short side-sills, or one (1) attached to top of running-board projecting outward above sill-steps or ladders on tank cars without side-sills. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands four (4) additional sill vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

Manner of application:

Same as specified for "Box and other house cars."

END HANDHOLDS.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of application:

Same as specified for "Box and other house cars."

TANK-HEAD HANDHOLDS.

Number:

Two (2). (Not required if safety-railing runs around ends of tank.)

Dimensions:

Minimum diameter five-eighths (5/8) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half (2½) inches.

Location:

Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform on running-board. Clear length of

handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Manner of application:

Tank-head handholds shall be securely fastened.

Safety-Railings.

Number:

One (1) running around sides and ends of tank or two (2) running full length of tank.

Dimensions:

Minimum diameter, seven-eighths (⅞) of an inch, wrought iron or steel.

Minimum clearance, two and one-half (2½) inches.

Location:

Running full length of tank, not less than thirty (30) nor more than sixty (60) inches above platform or running-board.

Manner of application:

Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

End-Ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft brackets, brake-wheel, running-boards or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Uncoupling-Levers.

Same as specified for "Box and other house cars."

Appendix "D".

Regulations Adopted by the Interstate Commerce Commission Pursuant to Sections 11 and 12, Title 45, United States Code.

Section 131.9 (Page 205). Code of Federal Regulations, Title 49, —Transportation.

TANK CARS WITHOUT END-SILLS
HAND-BRAKES.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion. The brake-shaft shall be located on end of car to the left of center.

Manner of application:

Same as specified for "Box and other house cars."

BRAKE-STEP.

Same as specified for "Box and other house cars."

RUNNING-BOARDS.

Number:

One (1)

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of tank.

Manner of application:

If running-boards are applied below center of tank, outside edge of running-board shall extend not less than seven (7) inches beyond bulge of tank.

Running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

SILL-STEPS.

Number:

Four (4). If tank has high running-boards, making ladders necessary, sill-steps must meet ladder requirements.

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side, flush with outside edge of running-board as near end of car as practicable.

Tread not more than twenty-four (24) preferably not more than twenty-two (22) inches above the top of rail.

Manner of application:

Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-step shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with one-half (½) inch rivets.

SIDE-HANDHOLDS.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car over sill-step on running-board, not more than two (2) inches back from outside edge of running-board, projecting downward or outward.

Where such side-handholds are more than eighteen (18) inches from end of car, an additional handhold must be placed near each end on each side not more than thirty (30) inches above center line of coupler.

Clearance of outer end of handhold shall be not more than twelve (12) inches, from end of car.

If safety-railings are on tank, four (4) additional vertical handholds shall be applied, one (1) over each sill-step on tank.

Manner of application:

Same as specified for "Box and other house cars."

END-HANDHOLDS.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on running-board, not more than two (2) inches back from edge of running-board projecting downward or outward, or on end of tank not more than thirty (30) inches above center line of coupler.

Manner of application:

Same as specified for "Box and other house cars."

SAFETY-RAILINGS.

Number:

One (1).

Dimensions:

Minimum diameter seven-eighths (7/8) of an inch, wrought iron or steel.

Minimum clearance two and one-half (2½) inches.

Location:

Safety-railings shall be continuous around sides and ends of car, not less than thirty (30) nor more than sixty (60) inches above running-board.

Manner of application:

Safety-railings shall be securely fastened to tank or tank-bands, and secured against end shifting.

Uncoupling-Levers.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars," except that minimum length of uncoupling-lever shall be forty-two (42) inches, measured from center line of end of car to handle of lever.

Location:

Same as specified for "Box and other house cars," except that uncoupling-lever shall be not more than thirty (30) inches above center line of coupler.

End-Ladder Clearance.

No part of car above buffer-block within thirty (30) inches from side of car, except brake-shaft, brake shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer block or back-stop, and no other part of end of car or fixtures on same, above buffer-block, other than excepts herein noted, shall extend beyond the face of buffer-block.

Appendix "E".

Opinion Below.

Before HUTCHESON, Chief Judge, HOLMES, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: This is another case like *O'Donnell* v. *Elgin*, 338 U. S. 384, *Carter* v. *Atlanta*, 338 U. S. 430, and *Affolder* v. *New York, Chicago & St. Louis*, 339 U. S. 596, in which a claimant, for injury resulting from defects in a railroad car, invokes both the absolute liability imposed by the Safety Appliances Act, 45 U. S. C., Secs. 1 to 46, and the qualified liability arising out of negligence. In those cases it was negligence under the Federal Employers Liability Act, 45 U. S. C., Secs. 51 to 60. Here it is negligence at common law.

In those cases, particularly in the *O'Donnell* case, the Supreme Court points to the wide spread confusion attending the anomalous procedure employed in prosecuting such claims.[1] The same difficulties have made themselves felt here with the result that on the appeal of the Atlantic Coast Line Railroad Company, the judgment must be reversed and the cause remanded.

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[1] "Notwithstanding this court's efforts to distinguish the safety appliance violation case from the common-law negligence case, confusion of the two persists, in part, at least, due to the anomalous procedure by which such claims are litigated. * * * The appliance cause often is joined with one for negligence, and even sometimes, as here, mingled in a single mongrel cause of action. In addition, at trial, certain issues such as causation and extent of injury, for example, are common to both causes of action. * * *"

"* * * Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on negligence are set forth separately from those based on violation of the appliance acts.

"But no matter how the pleadings are allowed to stand, we think it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed. * * *" *O'Donnell* v. *Elgin*, 338 U. S. 384.

The matter stands differently, however, on the appeal of plaintiff from the judgment upon a directed verdict as to the Southern Railway Company. For the reasons hereafter stated, as to it this judgment must be affirmed.

Brought against the Atlantic Coast Line Railroad Company, as the delivering, the Southern Railway Company, as the originating, carrier, the suit was for damages for personal injuries received by plaintiff, an independent contractor and invitee, as the result of the breaking when he stepped upon it of a dome step on a tank car which he had been engaged to unload.

Complying with the admonition of the court in the *O'Donnell* case, *supra*, the complaint was in two counts. Count One charged that the dome step was a safety appliance, and that its breaking was a violation of the Appliances Act. Count Two charged that the defendants negligently furnished and tendered, for the unloading of the gasoline therein, a defective tank car.

In addition to a general denial, the Atlantic Coast Line alleged as to the first count, (1) that the dome step was not a safety appliance within the meaning of the act, and (2) that if it was, plaintiff, not being a railroad employee, was not entitled to the benefits of the act.

As to the second count, the charge of common law negligence, it alleged: that the board which gave way had been newly painted; that the defect in it was not a patent but a hidden defect, which could not have been discovered by the use of ordinary care; and that the Atlantic Coast Line, as a delivering carrier, was not as matter of law, and could not be found, guilty of negligence in handling the car.

The Southern Railway alleged: that the Alabama Statute of Limitations of One Year had barred the cause of action as to it, and (2) that it was not the originating carrier, and that it had never had the car in its possession.

On the issues thus joined, the cause was tried to a jury on evidence which included uncontradicted evidence: that the New Orleans and Northeastern Railroad Company was the initial carrier of the car; that the Southern Rail-

way Company had at no time had anything to do with its handling; and that, though the stock of the New Orleans and Northeastern Railroad Company was solely owned by it, Southern Railway Company was an absolutely separate corporation; that it did not operate its subsidiary; and that it had never handled the car.

The district judge, therefore, instructed a verdict for the Southern Railway and submitted the cause to the jury as to the Atlantic Coast Line on both counts and on a general charge.

There followed a general verdict and judgment for $7,500.00 against Atlantic Coast Line from which that defendant has appealed, while plaintiff has appealed from the judgment in favor of the Southern Railway Company.

Here the Atlantic Coast Line insists that it should have had an instructed verdict on both counts, and that the judgment must be reversed and rendered for it. As to the first count, it claims: (1) that the dome step or platform was not a safety appliance; and (2) that if it was, plaintiff may not invoke the benefit of the act. As to the second count, its claim is that the evidence establishes as matter of law: that the defect in the board was not patent but latent; and that defendant had made the usual careful inspection of the car and the defect complained of was not discoverable upon such an inspection.

In the alternative, it urges upon us that if it was not entitled to an instructed verdict throughout, it was certainly entitled to an instruction as to Count One and, finally, that if it was not entitled to an instructed verdict at all, there were errors in the charge and in the refusal of its requested instructions which require a reversal.[2]

[2] Since the error will not again occur, in view of the fact that the safety appliance count has been eliminated, it is sufficient at this time to say that in charging the issues raised by the two counts, the court did not follow the admonition of the Supreme Court in the O'Donnell case to keep the issues of the two counts completely separate and distinct. On more than one occasion he charged in a way which made it extremely difficult if not impossible for the jury to avoid confusion, if not bewilderment, in respect to the completely different concepts of absolute liability under count

We find ourselves in complete agreement with the position taken and the reasons given for that position in the appellant's brief with respect to the first count. This is that, when a railroad company has complied with the regulations prescribed by the Interstate Commerce Commission, pursuant to the authority delegated to it in 45 U. S. C. A., Sec. 11, *et seq.*, it "* * * has discharged its full duty so far as the ladder [or any other safety device] requirement of the Safety Appliances Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the Commission." *A. T. & S. F. RR. Co.* vs. *Scarlett*, 300 U. S. 471; *Apache Ry.* v. *Shumway*, 158 Pac. (2) 142.

We agree with the appellant that the dome step is not, within the classification of the I. C. C., a running board, and that, in assuming, without any basis in law for the assumption, that it was a safety appliance, the court erred. He did correctly declare in his charge that whether it was or was not a safety appliance was to be determined as matter of law and that he did not and would not consider the testimony of any of the witnesses as to whether it was or was not. Without, however, any basis in the statute or in any order or regulation of the Commission for so holding, he did determine as matter of law that it was a safety appliance. So determining, he advised the jury that it was not for it to determine whether it was or was not such, but only whether it was safe, and thus imposed upon the defendant, as to the dome step, the absolute obligation imposed by the statute only with respect to safety appliances. In doing this, he erred.

As appellant correctly points out in the discussion in its brief, a chaotic condition would be produced if the

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one, if the step was unsafe, and conditional liability under the second count, only if its unsafety was the result of negligence.

Further, while the district judge, in the general charge, did endeavor to correctly present the defense which defendants put forward in their special charges numbered 9 to 13, inclusive, we are of the opinion that he did so skimpingly, if at all, and that this failure should be remedied on another trial.

question of compliance with the Safety Appliances Act and the specifications governing the number, location, dimension and manner of appliances should be left to the varying notions of judges or the inexperienced laymen who comprise petit juries. For it is not every device with which a car might be equipped which comes under, and is governed by, the Safety Appliances Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such. *Central Vermont Railroad* v. *Perry*, 10 F. (2) 132; *Fleming* v. *Richardson*, 24 N. W. (2) 280; *James C. Davis* v. *Maury*, 266 U. S. 401; *Hill* v. *Minneapolis*, 200 N. W. 485.

Nowhere in the regulations adopted by the Interstate Commerce Commission relating to tank cars, as set forth in Secs. 131.8 and 131.9, Title 49 (Transportation) Code of Federal Regulations, or elsewhere, will there be found any reference to a dome step board, by whatever name that device might be labeled.

By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act.

A verdict should have been instructed on the first count.

In view of our agreement with appellant that the step is not a safety appliance, it is unnecessary for us to consider and decide whether defendant is right in its second position, that plaintiff, not being a railroad worker, is not entitled to the protection of the Act. It is sufficient to refer to cases pro and con. *Patton* v. *Baltimore*, 197 Fed. 732; *Reisberg* v. *Duluth*, 47 N. W. (2) 113; *Fairport* v. *Meredith*, 292 U. S. 598; *Brady* v. *Terminal*, 303 U. S. 10; *Jacob* v. *Ill.*, 63 So. 306.

As to the second count, we agree with Atlantic's view that if the defect in the board was not discoverable in the exercise of reasonable care, it could not, as delivering carrier, be held negligent for not discovering the undiscoverable.

We cannot agree with it, though, that the evidence established as matter of law that, in the exercise of due care, the defect was undiscoverable. On the contrary, we think there was sufficient evidence to take the second count to the jury.

Because, however, of the submission of the two counts for a general verdict,[3] and because of the errors in the giving and refusal of charges, the judgment may not be affirmed as to Atlantic on the second count.

As to plaintiff's appeal from the judgment for Southern Railway, Southern meets it first with a motion to dismiss because the appeal was not timely. The point made is that, instead of being taken within the time limited from the entry of the judgment in Southern's favor, it was not taken until after the motion of Atlantic for a judgment notwithstanding the verdict and, in the alternative, for a new trial, had been acted upon.

Without laboring the matter by a discussion of them, it is sufficient to say that, under the cases cited by appellant, *Continental* v. *U. S.*, 167 F. (2) 107, a case from this court of *Zimmern* v. *U. S.*, 298 U. S. 167, and the case of *Leishman* v. *Associated*, 318 U. S. 203, the point is not well taken. The appeal was timely. It may not be dismissed.

On the merits, however, we agree with Southern: that, under the undisputed facts, Southern was not the alter ego of the N. O. and N. E. Railway Company; that it was not, and could not be, sued as the original carrier; and that the district judge was right in instructing a verdict in its favor.

No useful purpose will be served by setting out in detail the evidence on which this conclusion is based. It suffices to say that while Southern, as the holding company, has the same general executive officers as its subsidiary, the other employees are not the same. The Southern Railway, as

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[3] The court charged the jury: "You must determine, Gentlemen, whether the plaintiff is entitled to recover under either theory of this complaint. It is not necessary for you to designate in your findings which theory your predicate your findings under, if you find that the plaintiff is entitled to recover under either theory of this case."

such, does not run or operate the N. O. & N. E. Railway Company, and it had nothing to do with the handling of the car in question, as originating carrier or otherwise. A consideration of the cases on which appellant relies for his different view shows that they do not, as applied to the facts of this case, at all support it. This is particularly so with respect to the case on which he mainly relies, *Southern Railway* v. *Crosley*, 201 F. (2) 878, in which the facts were wholly different.

Without setting out the facts of this case, it is sufficient to say that to hold under them that the Southern Railway Company may be sued as the operator of the N. O. and N. E. Railroad Company, and, therefore, the originating carrier, would require a holding in substance that a holding company is responsible simply because it is a holding company, as the actor in the routine, the ordinary, activities of its wholly owned subsidiary in and about the business which the subsidiary was incorporated to, and does, actively own and operate.

The judgment is AFFIRMED as to the Southern Railway Company. It is REVERSED and REMANDED as to the Atlantic Coast Line for further and not inconsistent proceedings.